United States Court of Appeals

for the Second Circuit

APPENDIX

74-1708

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID DeMATTIES,

Plaintiff-Appellant

vs.

EASTMAN KODAK COMPANY,

Defendant-Appellee

APPENDIX ON APPEAL

CIVIL NO. 1973-478
DOCKET NO. 74-1708

JOAN de R. O'BYRNE
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INDEX TO APPENDIX

LAW OFFICES OF
Wood, Richardson and O'Byrne
REYNOLDS ARCADE BUILDING
ROCHESTER, NEW YORK 14614
716-454-2151

ATTORNEY FOR Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID DeMATTEIS,

Plaintiff,

vs.

COMPLAINT

EASTMAN KODAK COMPANY,

Defendant.

I

NOTICE OF CLAIM

1. This is an action for declaratory relief and damages to redress the deprivation of rights secured to the plaintiff by the Thirteenth and Fourteenth Amendments to the United States Constitution and, 42 USC Section 1981, Section 1983, and Title VII of the Civil Rights Act of 1964 (42 USC Sec. 2000e et seq.) as amended.

II

JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 28 USC Sec. 2201 and 2202, 28 USC 1343 (3)(4) and 42 USC Sec. 200 e-5(f).

III

PLAINTIFF

3. Plaintiff was at all times mentioned herein employed by the defendant, Eastman Kodak Company, as a senior Laboratory Technician, attached to the Emulsion Research Department. Plaintiff is 63 years old, a caucasian, a citizen of the United States, a resident of the City of Rochester, County of Monroe and State of New York, and at the time of the filing of this complaint, retired from the defendant company.

IV

DEFENDANT

4. Defendant, Eastman Kodak Company, hereinafter referred to as "Kodak" is an employer in the photographic industry in the Rochester metropolitan area.

V

STATEMENT OF CLAIM

5. Plaintiff was hired as a Laboratory Technician by Kodak on July 29, 1941; plaintiff continued to work at Kodak from July 29, 1941 to November, 1972, when plaintiff was "forced" into an early retirement by defendant company by reason of the hereinafter mentioned unlawful acts. (Plaintiff worked for Kodak for approximately thirty-one years when he retired)

6. That on or about January 12, 1965, while employed at Kodak, the plaintiff sold his home located at 3 Woodland Circle, Rochester, New York, 14622, to a Dr. William Lee, a black and also an employee of defendant company. Such home was located in an all-white neighborhood, such neighborhood being composed primarily of Kodak employees.

7. That on the day the plaintiff first showed his home in August, 1964, to the black family (Lee family), the plaintiff received an anonymous telephone call threatening his life and also threatening to make plaintiff's job at defendant company unbearable if he sold his home to Dr. Lee. Plaintiff is informed and believes that such telephone calls were made by a neighbor employee of defendant company. That such anonymous telephone calls continued well during the period of negotiation on the sale of his house to Dr. Lee and well into 1972 (approximately seven years).

8. That in addition to the telephone calls, plaintiff's wife, Agnes M. DeMatteis, also at all times mentioned herein an employee of Kodak, received through the inter-office mail system sometime in 1966, an anonymous letter, undated, stating:

"Keep your nigger kids off
Owaissa Drive! I don't want
them playing with my children,
and I don't like to see them
playing with other white children!

A 'White' Neighbor"

A copy of such letter is marked Exhibit "A" and is attached hereto, incorporated herein and made a part hereof.

9. That from approximately January, 1965 through 1972 (when plaintiff retired from Kodak) plaintiff experienced harrassment, intimidation, coercion, threats and discriminatory treatment by many and sundry of his co-workers, supervisors, executives and the Medical Department of Kodak for the purpose, inter alia, of making his job unbearable, destroying his physical and mental health and for the purpose of forcing plaintiff into a retirement all in retaliation for the plaintiff's sale of his house to Dr. Lee in January of 1965.

10. That plaintiff is informed and believes that such discriminatory acts and omissions by defendant company and its employees directly resulted from the sale of his house to a black family and were in retaliation for plaintiff's sale of his home to a black family in an all-white Kodak neighborhood. Such acts and omissions include but are not limited to the following:

(a) On May 29, 1965, plaintiff had an operation for a double hernia. Plaintiff was advised by his own physician, Dr. Virgo, that he should not return to work for at least "three months" (August 11, 1965). That on or about July 17, 1965, plaintiff voluntarily reported to the Kodak Medical Department for the purpose of informing such Department and Kodak that he was leaving the City for recuperative purposes and would report to work on August 11, 1965. That one Dr. Munson, a Kodak physician employee informed plaintiff that " you (plaintiff) are reporting back to work July 19, 1965, whether

you like it or not"; and further, plaintiff is informed and believes that Dr. Munson told plaintiff's physician, Dr. Virgo, that if plaintiff did not return to work July 19, 1965 "he will be jeopardizing his job". That plaintiff reported such incident to Mr. Shepler of the Kodak Personnel Department.

(b) Between July, 1965 and continuing through 1966, plaintiff continued to receive anonymous telephone calls threatening his life and threatening to make his conditions on the job unbearable. (During this year, plaintiff received that certain letter marked Exhibit "A").

(c) On or about January, 1967, Mr. Charles Brelsford, then the Personnel Director of Research Labs., called plaintiff into his office and told plaintiff "he (plaintiff) had a negative attitude". Plaintiff informed Mr. Brelsford of the Medical Department incident of July 17, 1965, hereinabove alleged in paragraph 10 (a) and the anonymous telephone calls. Plaintiff requested of Mr. Brelsford the name of the person who had accused plaintiff of having a "negative attitude". Plaintiff informed Mr. Brelsford that under the Kodak handbook entitled "You and Kodak, a Handbook for Kodak Men and Women", Section entitled: "Open Door", paragraph 3, a copy of which is attached hereto, marked Exhibit "B" and incorporated herein and made a part hereof, plaintiff was entitled to "confront his accuser". Mr. Brelsford refused to identify the person who had complained that plaintiff had a "negative attitude" and further refused to produce such person. Plaintiff is informed and believes that such accuser was Dr. Kennard, then the Assistant Director of Emulsion Research, and also a very close friend of one of the defendant's former neighbors on Woodland Circle. Plaintiff is informed and believes that such evaluation by plaintiff's supervisor (that he had a negative attitude)was arbitrary and unfair and not based on fact.

(d) That on or about March, 1967, three months following the arbitrary evaluation by Brelsford in January, 1967, Dr. Kennard, then the

Assistant Director of Emulsion Research, requested of plaintiff that he accept a job transfer to the "processing" Department. While such job was represented to him as being a "promotion", in fact, it was a demotion back to plaintiff's former position of 25 years ago. Plaintiff rejected Dr. Kennard's offer on medical grounds (plaintiff suffered from colitis, dermatitis and glaucoma), and also on the grounds that such offer was in effect an attempt to demote the plaintiff. When plaintiff rejected Dr. Kennard's offer of transfer, Dr. Kennard became abrupt with plaintiff and began shouting at plaintiff. Plaintiff told Dr. Kennard "to fire me if you want to get rid of me". Plaintiff is informed and believes that such supervisor deliberately attempted to demote the plaintiff.

(e) Plaintiff received no promotion or merit raises during the years 1965, 1966 and 1967.

(f) Plaintiff also, during the period from 1965 to 1968, had developed severe dermatitis; that plaintiff frequently consulted the Medical Department of Kodak for treatment, but such Kodak-physician-employees refused to treat the plaintiff and plaintiff consulted with an outside physician, Dr. Shaw, for treatment of his dermatitis condition.

(g) That on or about September, 1969, defendant company,(the exact persons or person responsible are unknown to plaintiff), caused the removal from his working area (a dark room in Building #59 of Kodak) of his telephone, such telephone being essential to the effective and efficient performance of his work. Plaintiff complained to his Supervisor, Donald Haag, then Supervisor, Color Testing, and requested an investigation into the matter, as plaintiff was unable to perform his job with the same degree of efficiency and proficiency as before the telephone was removed and plaintiff feared an unsatisfactory job evaluation as a result thereof. After several weeks had passed, Mr. Haag informed plaintiff that it was his opinion that

plaintiff did not need or require a telephone. That shortly thereafter plaintiff discovered that certain co-employees, whose names are unknown to plaintiff, deliberately started rumors that plaintiff had agreed that such telephone be removed from his "dark room". Plaintiff complained to Mr. Hagg's supervisor, John Marchant and requested of Mr. Marchant that the Company investigate the telephone removal and to investigate such false rumors; Mr. Marchant refused to investigate.

Plaintiff continued to work for approximately three (3) years without the necessary telephone.

(h) That during the period October through November, 1969, plaintiff was the butt of jokes and jibing by co-workers. Plaintiff reported such incidents to John Marchant, Supervisor, but Mr. Marchant refused to investigate or do anything further about plaintiff's complaint.

(i) That on or about February, 1970, Mr. Haag, plaintiff's supervisor, in the presence of two co-workers of plaintiff, one Gary Tanner and one James Noto, said, referring to plaintiff, "Piss on Dave (the plaintiff) that son-of-a-bitch" (S.O.B.). Plaintiff also contacted Mr. Bretsford, plaintiff's supervisor, concerning the S.O.B. incident herein described. Bretsford refused to take any action against Mr. Haag, although Mr. Bretsford expressed sympathy to plaintiff about the incident.

Plaintiff is informed and believes that James Noto made a formal complaint to Mr. Pelcher, then of the Personnel Department, concerning such characterization of the plaintiff by Mr. Haag. Plaintiff also made a complaint to Mr. John Marchant. Mr. Marchant told plaintiff "that is your (plaintiff) opinion" (referring to Mr. Haag's characterization of plaintiff as an S.O.B.) and Mr. Marchant refused to investigate, and further told plaintiff to "shut up and go back to work".

(j) During this period, (February, 1970) plaintiff continued to receive anonymous telephone calls at his home all to the effect "how do you like your working conditions now?" and the anonymous caller would then hang up.

(k) In March, 1970, one day after the incident alleged in paragraph 10 (i) (Mr. Haag calling plaintiff an S. O. B., etc., in the presence of two co-workers of plaintiff), plaintiff, upon going to work found that in addition to his telephone having been removed, certain supplies necessary to the performance of his duties, i.e., viewer table, heat sealer and record book, etc., had been removed from his dark room. Plaintiff immediately contacted Mr. Haag, his immediate supervisor. In Mr. Haag's office at the time of making such complaint was John Marchant. After repeated demands by plaintiff as to the whereabouts of plaintiff's supplies, Haag informed plaintiff that they (supplies) were on the "4th floor". Haag further refused to give plaintiff any explanation for the removal.

Plaintiff later contacted Mr. John Marchant individually in the presence of Mr. Haag, to complain about plaintiff's supplies being removed. However, Mr. Marchant refused to offer any explanation for the equipment removal and further denied any knowledge and refused plaintiff's request for an investigation of the matter. Mr. Marchant later admitted to plaintiff in the presence of Charles Brelsford that "they" should have consulted with plaintiff before such supplies were removed.

Plaintiff continued to work for approximately three (3) years without the necessary telephone and supplies.

(l) That on or about April 14, 1971, plaintiff was given the results by Joseph Altman (Marchant's replacement) of the Kodak periodic Rating Sheet (yearly job evaluations). Mr. Altman told plaintiff that plaintiff's rating sheet indicated that plaintiff was "uncooperative" and had had "poor attendance". Plaintiff disputed such rating and requested more specific and definite information. Such request was refused by Mr. Altman.

Plaintiff is informed and believes that Kodak, in addition to deliberately giving plaintiff a baseless, unsatisfactory rating, further

deliberately discriminated against plaintiff by utilizing a period of one year, for rating, rather than the usual and customary six-month period used for rating all other employees.

Plaintiff, disturbed by such rating of "uncooperative" and "poor attendance", decided to discuss the matter with John Leermakers, a Vice-President of Kodak. Plaintiff requested of Dr. Leermakers that he would like to discuss such rating with whomever accused plaintiff of being "uncooperative" and of having "poor attendance". Dr. Leermakers called a meeting of Mr. Charles Brelsford, then of the Personnel Department and plaintiff. Plaintiff was not allowed to bring any of his witnesses to such meeting although plaintiff made such request. Such meeting was totally unsatisfactory to plaintiff. Dr. Leermakers told plaintiff "to work out the remaining period (plaintiff was close to retirement) and forget it." That Dr. Leermakers refused to have Mr. Marchant at the meeting and said plaintiff "did not work for Marchant anymore". A few evenings later at 2:00 a.m., plaintiff received an anonymous telephone call wherein the caller stated "I see you didn't get far with Leermakers" and hung up.

One week later, plaintiff received another anonymous telephone call, the caller stating "How do you like your conditions at work now?"

(m) That on or about November, 1971, plaintiff "voluntarily" retired.

(n) On or about December 13, 1971, following plaintiff's "voluntary" retirement, plaintiff, in accordance with the Kodak Handbook (Exhibit "B") formally in person made a complaint, concerning the past conduct of Kodak to Mr. Harms, of the Kodak Presidential Staff. Mr. Harms told plaintiff that "I agree with you 100%. Haag and Marchant should be fired." and further said he would immediately commence an investigation. In mid-February, 1972, plaintiff met with Mr. Harms and Mr. Harms told plaintiff, in effect, that

there was no substance to his (plaintiff's) claim.

(o) On or about March 22, 1972, plaintiff sent a letter to Mr. Zornow, Chairman of the Board of Kodak, complaining of the hereinabove conduct of Kodak. Mr. Zornow caused an investigation to be conducted by a Mr. Welsh, Vice President and Director of Kodak, and on June 6, 1972, plaintiff met with a Mr. Ross and a Mr. Welsh, both of whom are employees of Kodak, charged with the investigation caused by Mr. Zornow. At such meeting, plaintiff was informed that "Kodak was not responsible for the acts of its supervisors."

(p) That following such meeting of June 6, 1972, plaintiff telephoned Mr. Gerald Zornow, Chairman of the Board of Kodak. That one day after communicating with Mr. Zornow's office, Mr. Ross telephoned plaintiff and apologized to plaintiff, stating "we are responsible for the acts of our supervisors, however, we find no substance to your (plaintiff's) claim."

11. That for all the foregoing reasons, defendant has pursued a discriminatory policy as against plaintiff by denying equal terms, conditions and privileges of employment to plaintiff including but not limited to: Denying "equal treatment and fair consideration" contrary to management policy as set forth in directive dated April 19, 1973, entitled "To Members of Kodak Park Management", marked Exhibit "C" and attached hereto, incorporated herein and made a part hereof; denying medical treatment and facilities to plaintiff; denying to plaintiff the necessary equipment and supplies for the performance of his work, thereby resulting in unfair evaluations; refusing to take disciplinary action against co-workers and supervisors who called him obscene names; rendering unfair and arbitrary evaluations of plaintiff's job performance and attitude; compelling plaintiff to return to work contrary to his physical and mental wellbeing; all of which was in retaliation for plaintiff'shaving sold his home to a black family in an all-white "Kodak" neighborhood.

12. That Kodak operates under color of State Law because much of the defendant's work is public work performed in the metropolitan area, and further, that much of such work is contracted for or financed in whole or in part by local, state and federal governments. Other work performed by defendant, although private, is performed by employees who receive a substantial portion of their earnings from government contracts.

13. The State of New York has a law prohibiting unlawful employment practices (See Section 296 of the New York Human Rights Law). That on or about March 29, 1972, plaintiff filed discrimination charges against defendant with such Human Rights Division; that on or about February 26, 1972, plaintiff filed a discrimination charge with the United States Equal Employment Opportunity Commission (EEOC) naming Eastman Kodak Company as respondents; that on or about July 26, 1973, plaintiff received from the EEOC a Right-to-Sue letter (a copy of which is marked Exhibit "D" and is attached hereto, incorporated herein and made a part hereof) informing him that his charge had been dismissed for "no probable cause" and that he could bring this action within ninety (90) days of his receipt of said letter.

14. That as a result of the hereinabove described conduct by Kodak, plaintiff's mental and physical health deteriorated to such an extent that plaintiff was forced into an early retirement, causing plaintiff severe financial loss.

15. Plaintiff's remedy at law is inadequate.

WHEREFORE, plaintiff respectfully requests that this Court:

1. Enter a declaratory judgment declaring the acts of the defendant to be in violation of the Constitution and the laws of the United States.

2. Award the plaintiff back pay from the date plaintiff was forced into early retirement, including but not limited to wages lost by reason of the discriminatory acts herein alleged, and measured from the dates of those discriminatory acts, with interest thereon from November 1971.

3. Award plaintiff compensatory and punative damages for physical and mental injury as a direct result of defendant's unlawful acts.

4. Award the plaintiff his costs and attorney fees incurred in the prosecution of this case.

5. Award such other and further relief as this Court may deem just and proper.

Dated: September 12 1973.

Yours, etc.,

WOOD, RICHARDSON & O'BYRNE
Attorneys for plaintiff
Office and P.O. Address
610 Reynolds Arcade Building
16 East Main Street
Rochester, New York 14614
Telephone: 716-454-2151

Keep your nigger
kids off Owasso St!
I don't want them
playing with my
children, + I don't
like to see them
playing with other
white children!

A "white" neighbor

Exhibit "A"

talking with your supervisor, you may discuss your problems with:

a. Your supervisor's supervisor.

b. A member of your Industrial Relations Department. Your supervisor may suggest that you do this.

2. If you aren't satisfied with the way your problem has been handled, you may take it up with any member of departmental or divisional management in your plant or office. Your supervisor or the Industrial Relations Department will make such arrangements if you request it.

3. If you have taken the above steps and are still not satisfied with the way your problem has been handled, you should explain your feelings to the member of departmental or divisional management with whom you dealt in the second step, or talk with the people in your Industrial Relations Department. The division head or general superintendent would then be notified, and he would arrange a special meeting at your request, or if he thought it necessary, even without your request. This meeting would be attended by you and a member of the Industrial Relations Department familiar with your problem, by any other Kodak man or woman who may be in a position to contribute constructively to a solution, and by any members of management from your supervisor to the plant manager, if they can help in any way. This meeting or meetings would be expected to lead to a final decision based on fairness to everyone concerned.

These rather formal steps may follow a somewhat different progression if you work in such organizations as marketing units or processing laboratories. Your supervisor will be glad to explain how the Open Door works in such cases; however, the basic principles and objectives are the same.

2

YOUR WAGES

Wages at Kodak are established to represent fair payment to you for the work you are doing. The Company's wage policy follows these guidelines:

1. Jobs will be evaluated in a uniform way throughout all divisions of the Company to insure equitable wages, and, consistent with this objective,

2. Wages will be equal to or above those gen-

Exhibit "B"

April 19, 1973

To Members of Kodak Park Management:

The Kodak code of industrial relations embodies the policies and principles governing relationships within the Company. The years have not lessened the value of these guides to good human relations. In fact, the growth of the Company over the years and its good reputation have come about, in a large measure, from adherence to these principles. It is my earnest conviction, therefore, that frequent reexamination of these principles will serve as a reminder to each of us of their importance in our daily work.

The industrial relations program is based on a full realization of the importance of the individual, the need for his full and effective cooperation, along with a proper regard for his rights, interests, achievements, and self-respect as an individual. Through this program the Company endeavors to achieve three goals:

1. To treat the individual in accordance with the fair consideration to which he is entitled.

2. To assist the individual's development in the best interests of both the individual and the Company.

3. To provide a fair reward to the individual for his specific contributions, including such provisions as can be made to meet both normal economic needs and normal risks to economic security.

The Company hopes that the various Kodak plans will contribute to a feeling of financial security among Kodak men and women. As important as financial security, however, is a sort of spiritual security which comes only with the conviction that each one of us is respected and that each one is fairly treated. Mr. F. W. Lovejoy, a former President of Kodak, was thinking of that when he wrote:

> "We expect that all those in the Company's employ who exercise supervision over the work of others, shall endeavor at all times

Exhibit "C"

to treat those under their direction as they themselves, under the same circumstances, would rightfully expect to be treated if the positions were reversed."

It is my sincere belief that good relationships based on this policy depend on the conscientious and reasonable efforts of all management people to do a good job as leaders; and the continuing effort of the Company to see that its industrial relations policies and procedures fairly serve the best interests of the individual and the Company.

The Company expects that all management people in all supervisory positions will give constant attention to maintaining a close personal touch with those working under their direction. This relationship is a necessary characteristic in the fair treatment of people. In this respect, the statement in the code of industrial relations pertaining to freedom of discussion with management is, I believe, of particular significance. This part of the code reads:

"The Company cannot emphasize too strongly its desire that all Kodak people shall feel free to seek information or advice from members of management on any aspect of their relationships with the Company, or to call attention to any condition which may appear to them to be operating to their disadvantage. No individual need hesitate to do this, and his standing with the Company will not thereby be prejudiced in any way. He will find his supervisor or the plant industrial relations personnel ready to talk over any of these matters and to give any assistance they can. The Company believes that most matters will be satisfactorily adjusted between the individual and the supervisor; but, if for any reason a person is not satisfied with such adjustment, he or she is and should feel completely at liberty to bring the matter to the attention of anyone in the management."

It is clear that our industrial relations efforts must go beyond policies and procedures. They must penetrate to the most fundamental sources of satisfaction -- those that come from doing a good job under the right kind of

circumstances. What the Company does in a general way is done simply in support of the supervisor's efforts to promote the interests and to safeguard the rights of his people while on the job. The supervisor is in the best position to understand the problems of the individual and to encourage him to his best efforts. To provide this kind of leadership demands a great deal of understanding -- understanding of people, of their daily problems, of the obstacles they encounter in their work. Leadership of this kind is a vitalizing force in attaining our industrial relations purposes, as well as our other social and economic goals.

How effectively do we work toward our industrial relations goals? What kind of leadership does each of us provide? To what extent do we provide each individual under our direction with full opportunity for recognition and self-development? Does each of us accord the individual fair treatment in line with the square deal policy? These, it seems to me, are some of the questions that we all, as supervisors, might well ask ourselves from time to time.

I am sure that no one of us is so naive as to suppose that excellent relationships exist everywhere all the time. We will find some friction and misunderstanding. We may make some mistakes. These need not be serious, however, as long as we avoid the fatal mistake of forgetting our basic obligation to the individual.

I am hopeful that each of us will express a firm belief in our industrial relations principles by a continuing effort to do a better job in this whole area of human relations.

Norman F. Beach

Norman F. Beach

NFB:ldm

Exhibit "C" 16

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

TO:	FROM:
David DeMatteis 44 Holcroft Road West Rochester, New York 14612	Equal Employment Opportunity Commission Buffalo District Office 1 West Genesee Street Buffalo, New York 14202

THIS CHARGE HAS BEEN DISMISSED FOR THE FOLLOWING REASON:	EEOC REPRESENTATIVE	
[x] NO REASONABLE CAUSE [ ] UNTIMELY CHARGE [ ] NO JURISDICTION [ ] FAILURE TO PROCEED	Lloyd G. Bell District Director	
	TELEPHONE NUMBER	CASE/CHARGE NUMBER
	(716) 842-5170	YBU3 200

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

Lloyd G. Bell
District Director

cc: Joan deR. O'Byrne, Esq.
Wood, Richardson and O'Byrne
Rochester, New York

Eastman Kodak Company
Rochester, New York

EEOC FORM 161 APR 73

Exhibit "D"

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DAVID DE MATTIES, Plaintiff,	:	MOTION TO DISMISS
vs.	:	FRCP 12(b), 12(e)
EASTMAN KODAK COMPANY, Defendant.	:	CIV-1973-478

Defendant moves the Court, pursuant to FRCP 12(b), as follows:

1. To dismiss the action on the ground that the court lacks jurisdiction over any claim brought under 42 U.S.C. §2000(e)(5) as more fully appears from the attached affidavit of David L. Hoffberg.

2. To dismiss the action because the facts alleged in Plaintiff's complaint regarding the relationship between the Defendant and the State of New York are insufficient as a matter of law to constitute State action within the meaning of the Thirteenth or Fourteenth Amendment to the United States Constitution or 42 U.S.C. §1983.

3. To dismiss the action because Plaintiff is white and therefore cannot recover for injury under 42 U.S.C. §1981.

4. To dismiss the action because Plaintiff is white and therefore has failed to state a claim for which relief can be granted upon 42 U.S.C. §2000(e) et seq.

5. To dismiss the action because Plaintiff's claim under 42 U.S.C. §1981 is untimely.

6. To dismiss the action because the complaint fails to state any claim against Defendant upon which relief can be granted.

7. For such further relief as the Court finds just and proper.

In the alternative, Defendant moves the court for an order pursuant to FRCP 12(e) requiring Plaintiff to separately state and number his causes of action in his complaint.

Dated: December 21, 1973

s/David L. Hoffberg
David L. Hoffberg

NIXON, HARGRAVE, DEVANS & DOYLE
Attorneys for Defendant
Office and Post Office Address
Lincoln First Tower
Rochester, New York 14603
Telephone: (716) 546-8000

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DAVID DE MATTIES, Plaintiff, vs. EASTMAN KODAK COMPANY, Defendant.	NOTICE OF MOTION CIV-1973-478

TO: WOOD, RICHARDSON & O'BYRNE
Attorneys for Plaintiff
Office and Post Office Address
610 Reynolds Arcade Building
16 East Main Street
Rochester, New York 14614
Telephone: (716) 454-2151

PLEASE TAKE NOTICE that the undersigned will bring a motion, pursuant to FRCP §12(b) to dismiss the complaint, and in the alternative, a motion to separately state and number his causes of action pursuant to FRCP §12(e) for hearing before this Court at the Federal Building, 100 State Street, Rochester, New York, on January 14, 1974, at 10:00 a.m., or as soon thereafter as counsel can be heard.

Dated: December 21, 1973

NIXON, HARGRAVE, DEVANS & DOYLE
Attorneys for Defendant
Office and Post Office Address
Lincoln First Tower
Rochester, New York 14603
Telephone: (716) 546-8000

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DAVID DE MATTIES,	:	AFFIDAVIT
Plaintiff,	:	CIV-1973-478
vs.	:	
EASTMAN KODAK COMPANY,	:	
Defendant.	:	

STATE OF NEW YORK:
COUNTY OF MONROE: SS:
CITY OF ROCHESTER:

David L. Hoffberg, being duly sworn, deposes and says:

1. I am a member of the firm of Nixon, Hargrave, Devans & Doyle, attorneys for Defendant, and I am fully familiar with the facts of this action.

2. Plaintiff has perhaps five separate causes of action alleged in his complaint, none of which are separately stated or numbered, creating unnecessary confusion for Defendant and for the Court.

3. On or about February 26, 1973, Plaintiff filed charged with the United States Equal Employment Opportunity Commission (EEOC).

4. On or before May 8, 1973, the EEOC notified Plaintiff that it had dismissed his charge, as more fully appears from the letter dated May 8, 1973, signed by Lloyd G. Bell, District Director of the EEOC, attached hereto as Exhibit "A" and the Determination of the EEOC dated May 7, 1973, mailed May 8, 1973, attached hereto as Exhibit "B."

5. The complaint herein was filed on October 3, 1973, which, upon information and belief, was not within ninety days of receipt of plaintiff of the EEOC's notice of dismissal of his charge.

6. Because Plaintiff failed to meet the requirements of 42 U.S.C. §2000(e)(5), this Court lacks jurisdiction of his claim under said statute.

Dated: December 21, 1973

s/David L. Hoffberg
David L. Hoffberg

Sworn to before me this
21st day of December, 1973.

s/Thomas S. Redland
Notary Public

May 8, 1973

Mr. Bryne Underhill
Public Affairs Department
Eastman Kodak Company
343 State Street
Rochester, New York 14650

RE: David DeMatteis v. Eastman Kodak Co.
Case No. YBU3 200

Dear Mr. Underhill:

We have investigated the charge of discrimination in employment for reason of race and national origin filed against your company.

This Commission has determined that there is no reasonable cause to believe that the matter alleged in the charge constitutes an unlawful employment practice under Title VII of the Civil Rights Act of 1964, as amended.

Therefore, we have dismissed the charge and the complainant has been notified in accordance with the Commission's Regulations of this determination and of his statutory right to institute a civil action in United States District Court under Section 706 of Title VII of the Civil Rights Act of 1964, amended.

Sincerely,

Lloyd G. Bell

LLOYD G. BELL
District Director

cc: Eugene Ulterino, Esq.
Nixon Hargrave Devans & Doyle
1 Exchange Street
Rochester, New York 14614

EXHIBIT A 23

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1 WEST GENESEE STREET
BUFFALO, NEW YORK 14202
(716) 842 - 5170

Case No. YBU3 200
Charge No. TBU2 0298

David DeMatteis
44 Holcroft Road West
Rochester, New York 14612

Charging Party

Eastman Kodak Company
343 State Street
Rochester, New York 14650

Respondent

DETERMINATION

Under the authority vested in me by Section 1601.19(b) of the Commission's Procedural Rules, 37 Fed. Reg. 20165 (September 27, 1972), I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness and all other jurisdictional requirements have been met.

Charging Party withdrew his complaint from State agency consideration when Respondent agreed to investigate the matter.

Charging Party (a Caucasian) alleges discriminatory treatment by Respondent's supervisors and Medical department resulted after he sold his home, formerly in an all white neighborhood where many of Respondent's employees lived, to a Negro who was employed by Respondent in the same building where Charging Party worked.

Exhibit B 24

Charging Party alleges that from the time he first showed his house to the Negro family he began receiving threatening anonymous telephone calls. He claims that the unknown callers threatened his life and also threatened to make his job at Respondent company unbearable. Charging Party evidently believes that the unknown callers are Respondent employees, and that they have somehow influenced his supervisors and Respondent Medical department personnel to harass him. Charging Party mentions a threatening letter meant for Dr. Lee that Charging Party's wife received in inter-office mail. Charging Party also infers that part of the unfair treatment he suffered while on the job may be due to the fact that he is of Italian national origin.

Charging Party further alleges that he was forced to take an early retirement because of poor health which condition was aggravated by the discriminatory treatment.

The discriminatory treatment alleged included:

(1) Adverse remarks about him by his supervisor in the presence of co-workers.
(2) Removal of a telephone from his immediate working area and the re-arrangement of his supplies and equipment against his wishes.
(3) Unfair evaluations by his supervisors of his attendance and cooperation.
(4) Being reported by the Medical department as fit to return to work two weeks before he was actually well enough to return to the job.
(5) Refusal of the Medical department to treat him for a dermatitis condition.
(6) Doing nothing to discipline a fellow worker who called him a "Fat Ass Dago" in the presence of supervisor.

Charging Party also claims that he brought the unfair treatment to the attention of Respondent management officials above the immediate supervisory level, and no corrective action was taken.

Because of the nature of the issues in the charge, investigation relied heavily on statements and affidavits from knowledgeable employees, representing both management and Charging Party's witnesses.

Appropriate Respondent records, including medical, were reviewed. Statements were obtained from Charging Party's personal doctors.

With respect to Charging Party's specific allegations, investigation reveals the following:

(1) Concerning adverse remarks by immediate supervisor, the latter in his affidavit claims that Charging Party liked to indulge in a lot of harmless practical joking, stating that when co-workers did the same to Charging Party, the latter "could not take it" and this led to occasional friction that ended up with name calling and hard feelings.

I credit Charging Party's own witnesses, both former co-workers of Charging Party in the latter period of Charging Party's employment. One stated in an affidavit, "There was a lot of friction between Dave and (supervisor). Dave had been around a long time and didn't think that (supervisor) was a competent supervisor. Dave didn't hide his feelings about (his supervisor). A great majority of those who worked for (supervisor) did not like him."

This witness of Charging Party indicated that many employees under the same supervisor were unhappy about things unrelated to discrimination. About this supervisor, witness further stated, "He was very hard to satisfy with respect to work performance --" and "I know Blacks and other minority employees of Kodak. I have never been aware of any discrimination affecting them. I feel the Company bends over backwards not to discriminate against anyone."

The other co-worker witness of Charging Party stated that he and other employees under subject supervisor were unhappy. They asked for and were transferred to other departments. This witness added, "Dave fought daily with (this supervisor) on day-to-day petty stuff." This witness said that of the group under this supervisor, six in all, only Dave and he were of Italian origin. He said there were about three Black employees that he recalls who worked under the supervisor when he (the witness) was employed there in the same unit. The witness stated, "I don't recall any situation that I could call discrimination of any nature involving (this supervisor) and any of his employees. Everybody seemed to have their own reasons for not liking (supervisor). But this was too general to be limited to a certain national origin, race, color, or creed."

(2) With respect to Charging Party's allegation about removal of the telephone and re-arrangement of certain equipment and supplies, I credit the Charging Party's witnesses and another employee who had some supervisory responsibility over Charging Party (a Respondent witness). They indicated that the removal of the phone from Charging Party's room coincided with a re-organization of the unit when more employees were placed under subject supervisor's jurisdiction.

Creditable witnesses also stated that the removal of Charging Party's phone was done when the telephone company urged that Respondent reduce the number of phones in the limited area from six to two. Witnesses believe that the argument over the re-arrangement of equipment and supplies was just another example of disagreements between Charging Party and his supervisor - and naturally the supervisor's desire prevailed in that matter.

(3) Concerning the alleged unfair evaluations by Charging Party's supervisors on factors of attendance and cooperation, investigation reveals that one supervisor who had supervisory responsibility for a short period (not the supervisor Charging Party complains about constantly) rated Charging Party as of March, 1971, about nine months before Charging Party retired. On the rating form is the remark, "At times, Dave is somewhat uncooperative.

Productivity would be improved with an improved attendance record."

Investigation reveals that there is no question that Charging Party was absent to a greater extent during this period due to illness and possibly due to the approaching retirement date. It is noteworthy that on the same evaluation is the comment, "Dave has attained a plateau in performance strength regarding past appraisal. A culminating point has been reached in growth with close proximity to leisure days ahead."

There is no evidence that Charging Party suffered because of this evaluation so late in his career.

(4) Relative to Charging Party's allegations of discrimination against Respondent's Medical department, the investigation covered a review of Respondent's medical file on Charging Party, comments from a doctor in that section and consideration of the statements submitted by Charging Party's own personal physicians.

I credit the following statement contained in one of Charging Party's doctor's letter, "He (Charging Party) gave me a history of abdominal cramping pain and frequent loose bowel movements, up to seventeen (17) a day, dating back to 1963." This would pre-date the selling of the house by Charging Party to his Negro co-worker by approximately two (2) years. Respondent medical file on Charging Party shows that he was attended by that department at least as early as 1963.

There is evidence that Charging Party has had for some time such problems as gastro intestinal difficulties, skin disease (psoriasis), and glaucoma.

It is believed that a reasonable consideration of Charging Party's long history of medical and physical problems would indicate that he might be tempted to take an early retirement, which is what the record of Respondent indicates. Respondent physician reveals that Charging Party elected early retirement not related to employment.

However, concerning Charging Party's specific complaint about the lost vacation, Respondent medical record, as presented by Respondent physician, shows that on May 26, 1965, Charging Party began sick leave for a double hernia operation under the care of Charging Party's own physician. The record shows that Charging Party was rated able to return to work by Respondent medical doctor as of July 19, 1965. Respondent doctor claims that when an employee has been absent for illness or other medical reasons for more than three days, he is required by Respondent's regulations to report to the medical department. Respondent doctor states, "We have the final say as to whether or not employee can go back to work."

In addition, Respondent doctor states that he called Charging Party's doctor on July 16, 1965 and Charging Party's doctor said that Charging Party was not ready to go back to work on July 16 - but "agreed Dave could return to work July 19, 1965."

Respondent doctor said Charging Party had evidently planned to go on vacation about July 19, 1965 and considered Charging Party's visit to Respondent medical department as an effort to extend his sick leave period another two weeks to cover his planned two week vacation. Thus, Charging Party would have received Kodak sick leave allowances for the two weeks in question and would thereby save two weeks of vacation time for future use.

(5) In attempting to resolve Charging Party's allegation regarding refusal of Respondent to treat a dermatitis condition, Respondent doctor claims that it was Respondent policy not to treat such a condition, and such cases were referred to outside specialists. Respondent doctor also stated that he is aware that Charging Party still has the skin condition after a long period of retirement, and claims that as evidence of Respondent's consideration that Charging Party's skin problem did not necessarily relate to Charging Party's former job.

(6) The allegation that Charging Party was called a "Fat Ass Dago" by another employee of Kodak in the presence of the supervisor, with no action being taken by the supervisor, could not be confirmed. However, the facts so far revealed in consideration of preceding allegations would lead a reasonable person to expect such remarks resulting from the practical joking and unfriendly environment described by witnesses.

In addition to the foregoing considerations, the following was also either revealed by the investigation or are what may be considered reasonable conclusions after giving full weight and consideration to this matter.

Although creditable evidence reveals that Charging Party did receive threatening phone calls, and witnesses confirmed the allegation that several Kodak employees lived in the neighborhood in question, investigation failed to show that any of Respondent company's supervisors, officials or other employees were in any manner involved in any adverse treatment of Charging Party that could be related to the selling of Charging Party's house to a Black co-worker.

Charging Party's constant referral in letters and statements that somehow the information about the sale of his house "leaked" to his supervisors seems somewhat unusual in view of supervisor's affidavit indicating that Charging Party made the facts known to his supervisor.

It is doubtful if Respondent company could in any way control the actions of its employees away from the place of business even if it could be shown that Respondent employees were actually involved.

One of Charging Party's witnesses stated that he sympathized sincerely with Charging Party, but he knew of no evidence that would tie Respondent to the adverse events affecting Charging Party.

One witness of Charging Party stated that Charging Party was very sensitive and sometimes emotional about how people treated him because Charging Party, as a youngster, had lived in a small town and was a member of one of a very few families of Italian national origin in that area.

Although there is no doubt that Charging Party has a medical problem that has grown progressively worse, again there is not any way that such aggravated condition can be related to any discriminatory acts of Respondent.

Further, creditable evidence establishes that Charging Party was not happy at his job at least during his last years of employment. He and his supervisors did not get along very well. There is some indication that one of Charging Party's supervisors was not liked by those who worked for him. Performance appraisals which are creditable indicate that Charging Party remained in one position for years and did not aspire to advanced positions even though he might have qualified for more responsible duties.

There is one further matter not yet considered. Charging Party furnished an envelope used by Respondent company for intra-company mail transmittal. The envelope contains a derogatory note signed, "a white neighbor." It is obviously directed to the Negro employee who purchased Charging Party's house. Charging Party states that the addressee on the envelope, Madjel DeMatteis, is his wife who worked for Respondent. Charging Party states that Owaessa Drive (mentioned in the letter) is in the white neighborhood of his former house. With only this information about the envelope and its contents, nothing can be reasonably concluded that would add or detract from the considerations already given this whole case.

It is our determination after careful consideration of all relevant evidence that although Charging Party did experience unpleasant working relationships and had an increasingly worsening health condition, there is no evidence that would link such conditions to discrimination by Respondent.

This determination concludes the Commission's processing of subject complaint. Should the Charging Party wish to pursue this matter further, he may do so by following the instructions contained in the third paragraph of the accompanying letter.

On behalf of the Commission:

5/7/73
DATE

Lloyd G. Bell
Lloyd G. Bell, District Director

LAW OFFICES OF
Wood, Richardson and O'Byrne
REYNOLDS ARCADE BUILDING
ROCHESTER, NEW YORK 14614
716-454-2151

ATTORNEY FOR Plaintiff

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DAVID DE MATTEIS, Plaintiff

-vs-

EASTMAN KODAK COMPANY, Defendant

AFFIDAVIT IN OPPOSITION
TO MOTION TO DISMISS

CIV-1973-478

JOAN de R. O'BYRNE, being duly sworn, deposes and says:

1. That she is an attorney and counselor at law duly admitted to practice in all Courts of the State of New York, and is a member of the firm of Wood, Richardson & O'Byrne, attorneys for Plaintiff herein.

2. That your deponent makes this affidavit in opposition to Defendant's motion to dismiss.

3. That this action is properly brought and this Court has proper jurisdiction over Plaintiff's Claim pursuant to 42 USC Section 2000(e). That Plaintiff has properly complied with all prerequisites required by law in order for maintaining this action in the Federal District Court.

4. That as ~~one~~ a prerequisite to maintaining a civil suit by an aggrieved party in Federal Court it is necessary to receive notification from the EEOC that the aggrieved party may pursue his or her own remedy in the Courts.

Under the 1972 Amendments to Title VII, private individuals may initiate Court action in those instances where:

(1) The EEOC has dismissed the charge, or

(2) One hundred eighty (180) days have elapsed from the filing of the charge without the EEOC or the Attorney General as the case may be, having filed a complaint or without the EEOC having entered into a conciliation agreement to which the person aggrieved is a party.

Such action must be brought in an appropriate District Court within 90 days after receiving notification from the EEOC that the private individual

can pursue his or her remedy in the Courts, Title VII, 42 USC 2000(e) 5(f) 1. Such notification to such aggrieved party has by regulation been defined as "Notice of Right to Sue," (CFR 29, Sections 1601.25 and 1601.26(c)). See Exhibit 1 which is attached hereto, incorporated herein and made a part hereof. CFR 29 Section 1601.25(c) provides in part:

> "At any time after the expiration of 180 days from the date of filing of a charge or upon dismissal of a charge (emphasis added) at any stage of the proceedings, an aggrieved person may demand in writing that a notice be issued pursuant to 1601.25 and the Commission shall promptly issue a notice..."

The regulations hereinabove cited are devoid of any time period as to when such notice must be requested by the aggrieved party. Further, receipt by the aggrieved party of a Notice of Right to Sue is a jurisdictional requirement to the maintenance of a civil action. (In Stebbins v. Continental Insurance Co., CA, DC, 1971, 3 EDP, the EEOC held that in absence of special circumstances "Notice of Right to Sue" is a jurisdictional requirement and the fact that the EEOC fails to give such notice does not relieve the charging party of requirements since the EEOC Regulations authorize issuance of notice on request.)

Since procuring a Notice of Right to Sue before maintenance of a civil action is a jurisdictional prerequisite, Plaintiff could not have maintained this action upon mere notification to him by the EEOC of dismissal. It should be noted here again that neither Title VII or the Regulations provide any minimum time periods as to when such Notice of Right to Sue must be requested by charging party.

5. Plaintiff requested such Notice of Right to Sue on July 23, 1973. On or about July 26, 1973, Plaintiff received such Notice of Right To Sue and commenced his action in the appropriate Federal District Court on October 4, 1973, well within the 90-day period of limitation. Defendant has obviously confused a Notification of Dismissal with a Notice of Right to Sue, the Notice of Right to Sue being the crucial document by which the 90-day period of limitation begins to run.

6. That Defendant's jurisdictional basis for the maintenance of this action is in addition to Title VII, 42 USC 2000(e), Section 42 USC 1983, and the Thirteenth and Fourteenth Amendments to the Counstitution of the United States. Plaintiff in his Complaint has alleged state action.

7. Defendant Eastman Kodak Company is a "person" within the meaning of the Act. While the Court in Guthrie v. Alabama By-Products Co., (1971 DC Ala) 328 F Supp 1140, held that the Defendant company was not acting under color of law, it is a matter of proof as to whether there is state action or action under color of law in view of allegations in Plaintiff's Complaint and therefore is not subject to a dismissal.

8. That Defendant further seeks to dismiss Plaintiff's Complaint on the grounds that Plaintiff is white and therefore fails to state a claim for which relief can be granted pursuant to 42 USC Section 2000(e) et seq. This contention that a white may not invoke the provision of 2000(e) and/or the Civil Rights Act is erroneous.

9. In a most recent case, Auerbach v. African American Teachers Assoc., 356 F. Supp. 1046, (DC, Southern Dist., N.Y.), a group of white teachers brought an action against the defendant black teachers for maintaining segregated (black) facilities. Such action was brought pursuant to 42 USC 1983 and the Public Accommodation Act, 42 USC 2000(a) et aeq. The Court held that denial of the use of school facilities to white teachers by negro teachers who were holding a segregated meeting violated Federal Civil Rights laws 42 USC 2000(a) et seq., and under 42 USC 1983.

In EEOC Decision No. 71-2240, May 25, 1971, EEOC Vol. Dec.1973, paragraph 6278, the Commission assumed jurisdiction where charging party, a white secretary, charged that she was forced to resign so that she could be replaced by a black secretary in violation of Title VII, 42 USC 2000(e) et seq. The Commission held on the merits that there was no probable cuase to believe she was forced to resign because of her race, but did not reject complainant's charge on the grounds that because charging party is white the EEOC had no jurisdiction under Title VII. (See also EEOC Dec. No. 72-1067,

February 10, 1972, EEOC, Dec. Vol. 1973, paragraph 6374 wherein charging party was a white apprentice discharged from respondent Plumber's Union Apprentice Program.)

10. That Plaintiff's causes of action are set forth clearly and precisely as manifested by Defendant's ability to separately state grounds for their motion to dismiss based on the jurisdictional grounds alleged. There exists no uncertainties with regard to the causes of action set forth.

WHEREFORE, Plaintiff respectfully requests that Defendant's motion be dismissed.

/s/ Joan de R. O'Byrne
Joan de R. O'Byrne

Sworn to before me
this 25th day of January, 1974.

/s/ Bernadine B. Marcus
Notary Public

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

TO:	FROM:
David DeMatteis 44 Holcroft Road West Rochester, New York 14612	Equal Employment Opportunity Commission Buffalo District Office 1 West Genesee Street Buffalo, New York 14202

THIS CHARGE HAS BEEN DISMISSED FOR THE FOLLOWING REASON:	EEOC REPRESENTATIVE	
[x] NO REASONABLE CAUSE [ ] UNTIMELY CHARGE [ ] NO JURISDICTION [ ] FAILURE TO PROCEED	Lloyd G. Bell District Director	
	TELEPHONE NUMBER	CASE/CHARGE NUMBER
	(716) 842-5170	YBU3 200

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

Lloyd G. Bell

District Director

cc: Joan deR. O'Byrne, Esq.
Wood, Richardson and O'Byrne
Rochester, New York

Eastman Kodak Company
Rochester, New York

Rec'd 9/25/73

EEOC FORM APR 73 161

EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID DE MATTIES

- vs - CIVIL 1973-478

EASTMAN KODAK COMPANY

Wood, Richardson & O'Bryne
610 Reynolds Arcade Building
Rochester, N.Y. 14614
Attorneys for plaintiff

Nixon, Hargrave, Devans & Doyle
Lincoln First Tower
Rochester, N.Y. 14603
Attorneys for defendant

Plaintiff, a white male, sixty-three years old, was hired by the defendant in July 1941 and worked continuously for the defendant until November 1971 (paragraph 10m) when he was allegedly "forced" into early retirement because of alleged discriminatory acts of the defendant. Such claimed discriminatory acts by the defendant allegedly grew out of plaintiff's sale of his home in an all white Kodak neighborhood to a black Kodak employee in 1965.

On February 26, 1972 plaintiff filed a charge of discrimination against defendant with the Equal Employment Opportunities Commission.

The Equal Employment Opportunities Commission conducted an investigation of plaintiff's charge and reached its determination by a formal document called a Determination, executed under date of May 7, 1973 on behalf of the Commission by Lloyd G. Bell, District Director. By letter dated May 8, 1973 the Equal Employment Opportunities Commission informed plaintiff that "although charging party did experience unpleasant working relationships and had an increasingly worsening health condition, there is no evidence that would link such conditions to discrimination by defendant."

On or about July 26, 1973, plaintiff, pursuant to his demand, received a "Notice of Right to Sue" (exhibit D attached to the complaint).

This action was commenced by the filing of a complaint with the Clerk of this Court on October 3, 1973. The plaintiff seeks a declaratory judgment, compensatory and punitive damages for physical and mental injuries, costs and attorneys fees.

By written motion, with supporting affidavit of David L. Hoffberg, one of defendant's attorneys, sworn to December 21, 1973, and other attached documents, the defendant moved to dismiss the action under six separately stated and numbered grounds.

One of the grounds (number 1) is that this court lacks jurisdiction over any claim brought under 42 U.S.C. Section 2000e-5, because the complaint herein was filed October 3, 1973, more than ninety days after receipt by plaintiff of the notice of dismissal from the Equal Employment Opportunities Commission of the plaintiff's charge of discrimination (by letter of May 8, 1973), and that this letter was received by the plaintiff on or about May 8, 1973. The plaintiff's brief page 1, last paragraph, stated "The Equal Employment Opportunities Commission conducted an investigation of plaintiff's complaint and by letter of May 8, 1973, over one year and two months later, the Equal Employment Opportunities Commission informed plaintiff by letter that "although charging party did experience unpleasant working relationships and had an increasingly worsening health condition, there is no evidence that would link such conditions to discrimination by defendant"." The Equal Employment Opportunities Commission was not required to do anything more, to satisfy jurisdictional requirements, than to notify the plaintiff that his administrative remedies had been terminated.

The time for filing a civil action started to run upon the receipt by the plaintiff of the notification of dismissal of his charge by the Equal Employment Opportunities Commission, viz, several days (as long as it took for mail to reach the plaintiff) after the date of mailing of the notice dated May 8, 1973. The time for filing of a civil suit is controlled by the statute, Section 2000e-5(f)(1). The Equal Employment Opportunities Commission has no power to change the requirement of the statute by its rules or regulations. This suit filed October 3, 1973, well beyond the ninety day limit for the filing of a civil action, was too late. The suit was barred by the time limit for the filing of a civil suit.

The plaintiff argues that Beverly vs. Lone Star Lead Construction Corp., 437 F.2d. 1136 (5 cir. 1971) holds that the ninety day statute of limitations starts to run on the receipt of the document "right to sue" which the plaintiff in the case at bar received at his demand July 26, 1973. I do not so interpret that decision. In that case the court referred to "the receipt of the statutory notice of right to sue" (Page 1140), as one of the jurisdictional prerequisites to suit under Title VII. The Statute Section 2000e-5(f)(1) provides "---- shall so

notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought ----". The statute makes no reference to a document "right to sue" such as received by the plaintiff here in July 1973. I interpret the above quoted language of Lone Star to mean the right to sue on receipt by the claimant of notice from the Commission that the charge of discrimination was dismissed.

The complaint does not effectively allege facts which constitute state action within the meaning of the Thirteenth and Fourteenth Amendments or 42 U.S.C. Section 1983, Moose Lodge vs. Irvis, 407 U.S. 163.

Plaintiff, a white person, may not sue under 42 U.S.C. Section 1981. I decline to follow the district court decision in WRMA Broadcasting Co. vs. Hawthorne, 365 F.Supp. 577 (1973).

IT IS HEREBY ORDERED that the complaint in its entirety is dismissed.

Harold P. Burke

HAROLD P. BURKE
United States District Judge

April 19, 1974.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID DeMATTEIS

-vs-

Civ-1973-478

EASTMAN KODAK COMPANY

SIR: Take notice of an ORDER dismissing action in its entirety duly granted in the above entitled action on the 19th day of April, 1974, and duly entered in the office of the Clerk of the United States District Court, Western District of New York, on the 22nd day of April, 1974.

Dated: Buffalo, New York
April 22, 1974

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

To Wood, Richardson & O'Bryne
Attorney for Plaintiff

To Nixon, Hargrave, Devans & Doyle
Attorney for Defendant

FEDERAL RULES OF CIVIL PROCEDURE 77(d)

LAW OFFICES OF
Wood, Richardson and O'Byrne
REYNOLDS ARCADE BUILDING
ROCHESTER, NEW YORK 14614
716-454-2151

ATTORNEY FOR PLAINTIFF

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID DeMATTEIS,

Plaintiff,

-vs-

EASTMAN KODAK COMPANY,

Defendant.

Filed 5-15-74

NOTICE OF APPEAL

Civil No. 1973-478

PLEASE TAKE NOTICE that the above named Plaintiff, DAVID DeMATTEIS, hereby appeals to the United States Circuit Court of Appeals, Second Circuit, from an Order of the United States District Court, Western District, HONORABLE HAROLD P. BURKE, dated the 19th day of April, 1974 and entered on the 22nd day of April, 1974, dismissing Plaintiff's complaint in its entirety.

Joan deR. O'Byrne

Joan deR. O'Byrne

WOOD, RICHARDSON & O'BYRNE
Attorneys for Plaintiff
Office and Post Office Address
610 Reynolds Arcade Building
Rochester, New York 14614
716-454-2151

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DAVID DeWITTIS,

Plaintiff,

-vs-

EASTMAN KODAK COMPANY,

Defendant.

CIVIL NO.

1973-473

DOCKET NO.
74-1705

INDEX TO RECORD ON APPEAL

Plaintiffs:

1. Complaint with Exhibits.

2. Summons and United States Marshall's Return of Service of summons and complaint.

3. Stipulation by and between the respective parties' legal counsel extending time of defendant to appear, answer, or plead otherwise.

4. Defendant's Notice of Motion pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss complaint.

5. Stipulation by and between the respective parties' legal counsel adjourning hearing on defendant's motion to dismiss.

6. Affidavit of plaintiff's counsel, Joan de R. O'Byrne, Esq., in opposition to defendant's Motion to Dismiss.

7. Decision and Order by the District Court Judge Harold P. Burke dated April 19, 1974, and filed April 22, 1974, dismissing plaintiff's complaint in its entirety.

8. Plaintiff's Notice of Appeal from the District Court's Decision and Order.

Joan de R. O'Byrne
Attorney for Plaintiff
Office & P. O. Address
25 Main Street East
Rochester, New York, 14614.
Telephone: 716-546-3340.

Dated: June 4, 1974.
Rochester, New York.